IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APELLATE SIDE

CRIMINAL APPEAL NO.936 OF 1988

1. Tukaram Bhima Kesarkar,
   age 26 years.

2. Pandurang Bhima Kesarkar,
   age 38 years,
   both residents of Belgundi,
   Taluka Gadhinglaj, District
   Kolhapur.

   (At present detained in
   Yerawada Central Prison,
   Yerawada, Pune). .. .. Appellants/
   Orig. Accused

Versus

The State of Maharashra. .. .. Respondent

Mr.D.A. Nalavade for Appellants.

Mr.Dilip Bagwe, Special Public Prosecutor with
Mr.D.S. Mhaispurkar, APP for Respondent.

CORAM : SMT.RANJANA DESAI &
A.S. OKA, JJ.

DATED : 1ST NOVEMBER 2004

ORAL JUDGMENT : (Smt.Ranjana Desai, J.)

1. The appellants (original accused nos.1 and 2, respectively for convenience) were tried in the Court of the Additional Sessions Judge, Kolhapur

in Sessions Case No.62 of 1986 for offence under Section 302 read with Section 34 of the Indian Penal Code (for short, the "IPC"), for having committed the murder of one Jotiba Vishnu Powar in furtherance of their common intention on 22.3.1986 at 9 p.m. in village Belgundi.

2. At the trial, the case of the prosecution was as follows:-

. The accused and the deceased were the residents of village Belgundi. The deceased was a distant relative of the accused. About six months prior to the date of incident i.e. 22.3.1986, according to the prosecution, accused no.1 had stolen a bag of Kulathi belonging to the deceased and his father P.W.6 Vishnu Babu Power. He was caught red-handed by Vishnu with a bag. He was to be taken to the police patil of the village. However, the matter was settled amicably through the relatives. It appears that this resulted in strained relationship between the accused and the deceased.

3. On 22.3.1986, the accused accompanied by one Wandre was passing by the side of the cattle

shed of P.W.6-Vishnu. Wandre entered the cattle shed to see a pair of bullocks which Vishnu had purchased on that day. Accused no.1 was waiting for Wandre to come on the road. The deceased saw him standing there and accosted him. A quarrel ensued between the two. In that quarrel, accused No.1 slapped the deceased. This altercation got over. Thereafter, accused no.1 was going to his house. The deceased had gone to fetch water from the public bore-well near the house of P.W.2-Shankar Patane. After some time, the deceased and both the accused started quarrelling. There was a scuffle between the two. Both of them came before the house of P.W.2-Shankar Patane. By that time, Shankar Patane came there from his field. He kept his spade and sickle near the door of his house. He intervened to separate the scuffle. However, accused No.1 dealt a blow on the left base neck of deceased Jotiba with a sickle. As a result, the deceased was seriously injured. He ran towards the house of P.W.2-Shankar Patane. He entered the house from the first apartment, came out and fell in the corn-ears spread in the court-yard. P.W.3-Sudhakar Shankar Patane, P.W.5-Parvati Shankar Patane and Prabhakar Shankar Patane

witnessed the said incident.

4. On seeing the incident, Prabhakar was shocked. He had a fit. Shankar Patane, Parvati and Sudhakar took him inside the house and they were busy looking after him. P.W.12-Dattatraya Hanmant Magdum, who is an advocate, residing in the neighbourhood of Shankar Patane came there on hearing commotion. He went to Gadhinglaj police station and reported the matter to the police saying that there was a fight at his village and requested the police to bring injured Jotiba to the dispensary. Accordingly, the police came to the village. By that time, the accused accompanied by one Ishwara had gone to the police patil of the village, one Raosaheb Patil, P.W.1. police-men including police constable Rajkumar Bagane-P.W.8 took the jeep directly to the house of Raosaheb Patil because injured Jotiba was already removed to the dispensary at Gadhinglaj. Thereafter, the police patil accompanied by accused no.1 came to the scene of occurrence. Police patil inquired with Shankar Patane about the occurrence. He disclosed that accused no.1 had attacked the deceased with a sickle. Then they came to the police station at Gadhinjlaj.

Raosaheb Patil went to the dispensary to see Jotiba. Jotiba succumbed to the injury. Raosaheb Patil came to the police station and lodged his complaint which is treated as FIR and is at Exhibit-18. Raosaheb Patil gave the names of the accused as the assailants of Jotiba. On the basis of this complaint, investigation was started. The accused came to be arrested. Post-mortem was done on the corpse of Jotiba. The accused were also medically examined. After completion of the investigation, the accused came to be charged as aforesaid.

5. In support of its case, the prosecution examined as many as 13 witnesses, out of which P.W.2-Shankar Patane, P.W.3-Sudhakar Patane and P.W.5-Pravati Patane claim to be eye witnesses. P.W.1-Raosaheb Patil, who was working as police patil, has deposed about the lodging of the FIR by him. Post-mortem notes have been proved by P.W.4-Dr.Dattatraya Pavale. The prosecution also examined P.W.6-Vishnu Babu Powar and P.W.7-Shankar Kalu Mane to prove the motive. As regards details of investigation, the prosecution examined P.W.8-Rajkumar N. Bagane, P.W.10-Bhimrao G. Ghorpade and P.W.13-P.S.I. Shamsunder R.

Hegiste. The prosecution also examined P.W.12-Dattatraya H. Magdum, the advocate who had contacted Gadhinglaj Police Station first in point of time to secure medical aid.

6. The defence of the accused was one of denial. The accused admitted the scuffle. The accused admitted intervention of P.W.2-Shankar Patane. However, according to the accused when P.W.2-Shankar Patane was separating the scuffle, he had a sickle in his hand and accidentally the sickle fell on Jotiba's neck and he was injured. The accused contended that they were falsely involved in the offence by the prosecution witnesses.

7. After perusing the evidence on record, the learned Sessions Judge came to a conclusion that the prosecution had established its case against the accused beyond reasonable doubt. He, therefore, convicted the accused under Section 302 read with Section 34 of the IPC and sentenced them to life imprisonment. The said judgment and order is challenged in this Appeal.

8. We have heard Mr.Nalavade, learned Counsel

appearing for the appellants (original accused nos.1 and 2) and Mr.Bagwe, learned Special Public Prosecutor appearing for the respondent-State, at considerable length.

9. Mr.Nalavade, learned Counsel appearing for the appellants (original accused nos.1 and 2), contended that the evidence of the prosecution witnesses is replete with major omissions and hence, no reliance can be placed on them. He submitted that P.W.12-Magdum, who is an advocate, claims that he had gone to the scene of offence after hearing the commotion. P.W.2-Shankar Patane and members of his family were present there. According to Magdum from there he rushed to Gadhinglaj police station and informed the police about the assault on Jotiba. He however did not give the names of the assailants of Jotiba. Mr.Nalavade contended that Magdum is not a layman. He is a responsible advocate. It is inconceivable that he would not find out who was the assailant of Jotiba. It is equally inconceivable that Shankar Patane and members of his family would not tell Magdum the names of the assailants of Jotiba. This according to Mr.Nalavade suggests that the prosecution has suppressed the genesis of the

case. The learned Counsel further contended that the conduct of P.W.2-Shankar Patane is also suspicious. He does not tell Advocate Magdum the names of the assailants. He does not lodge an FIR, though he had seen the incident and had talked about it to Raosaheb Patil. The learned Counsel contended that P.W.2 Shankar, P.W.3 Sudhakar and P.W.5-Parvati have avoided to state that after the assault, Jotiba entered their house. The fact that Jotiba entered the house cannot be disputed because blood stains were found inside the house. According to Mr.Nalavade these witnesses are avoiding to state that Jotiba entered the house because the incident did not take place in the manner in which the prosecution wants us to believe it took place. He submitted that in the circumstances the defence version gets probablised that it was Shankar Patane's sickle which accidently landed on the neck of the deceased and the deceased ran inside the house of Shankar Patane crying "Mello Mello". The learned Counsel pointed out that P.W.3-Sudhakar has categorically stated that he saw his father after the entire incident was over. This, in the opinion of Mr.Nalavade, demolishes the entire prosecution case. The learned Counsel urged that

the evidence of discovery of sickle has rightly been rejected by the trial court. A vital link, which could have established the involvement of the accused, is, therefore, snapped. The learned Counsel further urged that there are injuries on the person of the accused which have not been explained by the prosecution and that is fatal to the prosecution case. He submitted that conduct of accused No.1 in going to the house of the police patil is significant and it suggests that he is innocent. Had he been guilty, he would not have walked up to the house of the police patil. The learned Counsel urged that there is a delay in lodging the FIR. Advocate Magdum or Shankar Patane could have lodged the FIR. So far as police patil is concerned, he has also not lodged the FIR immediately. He first went to the dispensary. Thereafter he went to the police station and lodged his complaint. Therefore, the possibility of concoction cannot be ruled out. Mr.Nalavade contended that all the witnesses have given different versions as regards the presence of advocate Magdum at the police station. Whereas from Magdum’s evidence, it appears that he was in the jeep in which police patil was present, the police patil does not say so. Even other

witnesses are not very clear as to when Magdum had arrived at the police station. He submitted that all this indicates that an effort had been made by Magdum, the police patil and Shankar Patane to concoct a false story to protect Shankar Patane. Mr.Nalavade submitted that so far as accused no.2 is concerned, there is no evidence to indicate his involvement. In the circumstances, Mr.Nalavade urged that this Court may set aside the order of conviction and sentence and acquit the accused.

10. In support of his submission that the prosecution has not explained injuries caused to the accused and this is fatal to its case, Mr.Nalavade relied on judgments of the Supreme Court in **Lakshmi Singh & ors. vs. State of Bihar (1976) 4 SCC 394, D.V. Shanmugham & anr. vs. State of A.P. (1997) SCC 349 and State of M.P. vs. Mishrilal (dead) & ors. (2003) 9 SCC 426**. As regards the duty of the prosecution to examine independent witnesses, the learned Counsel relied on the judgment in **D.V. Shanmugham's case (supra)**. Mr.Nalavade stated that the prosecution is required to prove its case beyond reasonable doubt. He submitted that the accused has to only probablise his defence. The degree and character

of proof, which he is expected to furnish, cannot be equated with the degree and character of proof which is expected from the prosecution. In support of this submission, he relied on a judgment of the Supreme Court in **Harbhajan Singh vs. State of Punjab & anr. AIR 1966 SC 97**. Mr.Nalavade contended that the prosecution must stand on its own feet. In support of this submission, Mr.Nalavade relied on a judgment of the Supreme Court in **Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SC 1622**. Mr.Nalavade contended that, in any event, if this Court comes to a conclusion that it was accused no.1, who dealt a blow on the deceased, he could at best be convicted under Section 304 Part II of the IPC and not for offence under Section 302 of the IPC. He submitted that intention to murder Jotiba can never be attributed to accused no.1. In support of this submission, the learned Counsel relied upon judgments of the Supreme Court in **SASI alias Chalil Sasi vs. State of Kerala (2000) 10 SCC 55, Kunhahyippu vs. State of Kerala (2000) 10 SCC 307**, **Augustine Saldanha vs. State of Karnataka (2003) 10 SCC 472** and a Division Bench judgment of this Court in **Kashinath Kisan Bhoye vs. The State of Maharashtra 1992 (1) Bom.C.R.**

95. According to Mr.Nalavade so far as accused no.2 is concerned there is no evidence to establish his involvement and hence he deserves to be acquitted.

11. Mr.Bagve, learned Special Public Prosecutor appearing for the respondent-State, on the other hand, submitted that no interference is called for with the impugned judgment and order. He submitted that the prosecution has proved its case to the hilt. The learned Counsel urged that while appreciating the evidence, regard must be had to the fact that the prosecution witnesses are rustic witnesses. In the nature of things, certain embellishments and variations are bound to be found in their evidence. On account of the same, their evidence cannot be discarded. In this connection he relied on a Division Bench judgment of this Court in **State of Maharashtra vs. Teju alias Tejsingh alias Tajkumar 2004 ALL MR (Cri) 463.** As regards the principles underlying appreciation of evidence in a criminal trial, the learned Counsel relied upon judgments of the Supreme Court in **State of U.P. vs. M.K. Anthony AIR 1985 SC 48** and **Inder Singh & anr. vs. State (Delhi Administration) AIR 1978 S.C. 1091 = 1978**

CRL. L.J. 766. Mr.Bagwe submitted that so far as the basic story of the prosecution is concerned, all the prosecution witnesses are consistent. He further submitted that there is no inordinate delay in lodging the FIR which can have an adverse impact on the prosecution case. He then submitted that even if the recovery of sickle is disbelieved, when there is consistent ocular evidence this circumstance does not discredit the prosecution case. He further submitted that the prosecution has also established motive. However, even if this Court holds that the motive is not established since there is consistent eye witness account absence of motive will recede in the background. As regards the statement made by the doctor that injury could be even accidental. Mr.Bagwe urged that ocular evidence unmistakably establishes that accused No.1 dealt the fatal blow on the deceased. Medical evidence cannot override it. For all these submissions, Mr.Bagwe relied on the judgment of the Supreme Court in **Gurnek Singh & anr. vs. State of Punjab 1988 (Supp) SCC 807**.

12. Mr.Bagve further contended that the defence of the accused is ridiculous. He submitted that it is improbable that any person

would go to separate the scuffle with a sickle in his hand. The theory propounded by the accused is inherently improbable and this false explanation itself would become a link in the chain of circumstances pointing to the guilt of the accused and this Court may draw an adverse inference against the accused. In support of this submission, the learned Counsel relied on a Division Bench judgment of this Court in **Manohar Kushaba Gangurde vs. Police Sub-Inspector of the State of Maharashtra 2004 ALL MR (Cri) 2676**. As regards the delay in filing the FIR, the learned Counsel relied the judgment of the Supreme Court in **Birbal vs. State of M.P. 2000 (10) SCC 212** and a judgment of the Supreme Court in **Ram Jag & ors. vs. The State of U.P. (1974) 4 SCC 201.** Mr.Bagwe contended that there is sufficient evidence against accused no.2. As regards the application of Section 34 of IPC, he relied on **Rishideo Pande vs. State of U.P. AIR 1955 SC 331**. Mr.Bagwe thus, contended that the prosecution has been successful in bringing home the guilt to the accused and, therefore, this Court may not interfere with the order of conviction and sentence.

13. Mr.Bagwe submitted that offence under Section 302 is clearly made out and this is not a case where the offence could be brought down under Section 304 Part-II of the IPC. He submitted that the assault was made with a deadly weapon. It was made on a vital part of the body of the deceased and, therefore, it is clear that the blow was intended to kill Jotiba. In this connection, he relied on the following judgments :

(i) State of U.P. vs. Virendra 2004 ALL MR (Cri) 850 (S.C.).

(ii) Shriram vs. State of Madhya Pradesh 2004 ALL MR (Cri) 859 (S.C.).

(iii) Abdul Shahim s/o Abdul Bashir & anr vs. State of Maharashtra 2003 ALL MR (Cri) 524.

(iv) Karimkha Ajijkha vs. State of Maharashtra 2003 ALL MR (Cri) 531.

(v) Vilasgiri s/o Vitthalgiri Goswami vs. State of Maharashtra 2003 ALL MR (Cri) 246.

(vi) Shankarrao Bhimrao Sarnaik & anr. vs. State of Maharashtra 2003 ALL MR (Cri) 251.

(vii) Basappa Bhimappa Dodamani vs. State 1961 Cri. L.J. 120 (Vol.62, C.N. 31) = AIR 1961 Mysore 21 (V 48 C5).

14. We have given our anxious consideration to the submissions advanced by both the learned Counsel. With their assistance we have gone through the evidence and record of the case. Before we start analysis of the evidence and deal with the rival submissions, we would like to refer to two judgments of the Supreme Court which set out the principles which the Court should bear in mind while appreciating evidence in a criminal trial. In **Inder Singh's case (supra)**, the Supreme Court was dealing with a murder appeal. The accused was convicted under Section 302 of the IPC. Certain persuasive factors which could militate against the culpability of the accused and the prosecution version of the precise nature

of the occurrence, were brought to the notice of the Supreme Court. While refusing leave, the Supreme Court observed as under:-

> " Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is urged that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it it argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of

fool-proof concoction. Why fake up ? Because the court asks for manufacture to make truth look true ? No, we must be realistic. "

15. In **M.K. Anthony's case (supra)**, the Supreme Court was again dealing with a murder appeal. As regards appreciation of evidence of the witnesses, the Supreme Court observed as under:-

" While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is informed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evolution of the evidence is shaken as to render it

unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.

> Cross examination is an unequal duel between a rustic and refined lawyer. "

We will approach this case with these principles in mind.

16. It is also important to note that almost all witnesses in this case are rustic witnesses. Even sophisticated witnesses, when they come to the Court to give evidence get confused. It is possible that a rustic witness may in the strange solemn and awe inspiring atmosphere of a court commit some mistakes. The standard, which is applied to the evidence of a sophisticated witness, cannot be applied to the evidence of a rustic witness. In this connection, we may usefully refer to the observations made by the Division Bench of this Court in **Teju alias Tejsingh alias Tajkumar's case (supra)** which are as under:-

> " We must express that while judging the depositions of rural witnesses, the Courts should not apply the same standard of exactitude and inconsistency as that for urban witnesses. These are rustic

> villagers and their idea of time is not accurate and it is based on approximation. Similar is the situation in respect of their versions in respect of other factors. If the courts start equating the depositions of rural witnesses with that of the urban ones, it would defeat the justice, particularly when there is a clear and unimpeachable evidence adduced by such witnesses making out the guilt of the accused. It is, therefore, necessary to keep these aspects in mind while appreciating the evidence of such witnesses and to find out whether the evidence is truthful, cogent and convincing. "

17. Our efforts will, therefore, be to see whether there are any major omissions or contradictions in the evidence of the witnesses which cut at the root of the prosecution case. We must find out whether it can be said that on account of the said omissions or contradictions, the substratum of the prosecution case has given way. If the substratum remains in tact, then minor inconsistencies or variations shall not

weigh with us.

18. The prosecution has led evidence to bring on record the strained relationship between the accused and the deceased. In this connection, two witnesses have been examined viz. P.W.6-Vishnu Babu Powar, father of the deceased and P.W.7-Shankar Kalu Mane. All other witnesses have also deposed about the strained relationship. We may only refer to P.W.6-Vishnu's evidence. He has stated that about six months prior to the incident, accused no.1 had stolen a bag of Kulathi belonging to him. He had caught him red-handed. He was taking him to the police patil for making complaint, but his father requested him not to do so. From that day, the relations between the two were strained. It does appear that the relations between the accused and the deceased were strained. But, in our opinion, in this case, there is consistent eye witness account and, therefore, assuming the prosecution has not established the motive, that will not affect the credibility of its case.

19. P.W.2-Shankar Ravaji Patane has stated that on 23.3.1986, he had gone to his field for

work. He returned to his house at 9 p.m. with a spade and a sickle in his hands. He saw a quarrel going on between the deceased and the accused. He kept the spade and sickle near the door of his house. Then he went ahead and asked the accused and the deceased not to quarrel. However, they did not listen to him. Whilst fighting they came upto the place where he had kept the sickle and spade. Then accused No.1 picked up the sickle and inflicted a blow on the left side neck of Jotiba. Jotiba ran upto the door of his house. He took turn and immediately fell on the corn-ears of maize. Accused no.1 went to his house. Father of the deceased came there. Prabhakar, son of this witness, had a fit. He then took him to the third room of the house. While he was in the house, he learnt that Jotiba was being taken to the dispensary by a rickshaw. After about an hour, police came by a jeep. PSI, Police Jamadar Savant and one Constable were in the jeep. He was directed to go to the police station. He went to the police station with his sons. His statement was recorded by the police. This evidence is severely criticised by Mr.Nalavade. He contended that there are serious omissions in his evidence. This witness had not stated in his statement

before the police that the deceased was calling both the accused to his house. He had also not stated in the police statement that accused no.1 assaulted Jotiba with sickle which he had kept near the door of his house. He has further stated that the deceased did not enter his house, whereas in the police statement, he has so stated. Mr.Nalavade contended that though advocate Magdum has stated that when he came to the scene of offence, Shankar Patane and females of his house were present, this witness does not refer to that fact at all. This makes his version suspect.

20. We are unable to agree with the learned Counsel. As regards the omission to say that Jotiba was calling both the accused to his house, we do not think that it is a significant omission at all. As regards the alleged omission that accused no.1 assaulted Jotiba with the sickle, which he had kept near the door of his house, the omission is only with respect to assault "with the sickle which he had kept near the house." There is no omission as regards assault by accused no.1 on the deceased with a sickle. It is true that this witness and his wife Parvati have not stated that Jotiba entered the house. It appears that Jotiba

did enter the house because the panchanama shows that there were blood stains inside the house. But that, in our opinion, does not suggest that these witnesses are not telling the truth. This appears to be out of their anxiety not to get involved in the offence. This witness categorically denied the suggestion that while he was separating the scuffle, the deceased rushed ahead and the sickle in his hand hit him and thereby he was injured. We feel that undue importance cannot be attached to the fact that this witness did not tell advocate Magdum the names of the assailants. It has come on record that his son had a fit and the members of the family were busy attending to him. In such a situation, no adverse inference can be drawn because he does not give the names of the assailants to advocate Magdum. We must keep in mind the fact that this witness is a rural witness. His evidence deserves to be accepted as it is consistent with the evidence of his wife P.W.5-Parvati.

21. P.W.5-Parvati has stated that at about 9 to 9.30 p.m., she heard the noise of a quarrel outside her house. The quarrel was going on

between Jotiba and the accused. Both the accused were giving abuses to Jotiba. A scuffle ensued between the two. They came to her court-yard. She was telling them not to quarrel. By that time her husband came there. He told them to go away as the grain was being destroyed. He had a spade and a sickle in his hand. He kept them near the wall of his house. Accused no.1 picked up the sickle and inflicted a blow on the left side of Jotiba's neck. Jotiba raised a cry. He came to the door of her house and then turned back and fell on the corn-ears in the court-yard. Seeing the incident her son Prabhakar had a fit. He was taken inside the house. In her cross-examination, there are no major omissions. She has not stated in the police statement that she had asked the accused and the deceased to go away. She has also not stated in her police statement that her husband had kept the sickle and spade and accused no.1 had picked up that sickle. But this witness is firm about her case that accused no.1 assaulted the deceased with a sickle. On this aspect, there is no omission. On the major aspect of the prosecution story, there is consistency between Parvati's evidence and the evidence of P.W.2-Shankar Patane. We, therefore, find no

difficulty in placing reliance on this witness.

22. So far as P.W.3-Sudhakar Shankar Patane is concerned, he claims to have seen the incident. However, at one stage in the cross-examination, he has stated that he saw his father after the entire incident was over. He has stated that he did not see his father while he was coming to the house. It is argued that if that is so, it is risky to accept his claim that he saw his father intervening in the quarrel. However in his statement recorded under section 313 of the Code of Criminal Procedure (the "Code" for short) accused no.1 has stated that P.W.3 Sudhakar's evidence that he and the accused were quarrelling in the court yard of his house, and therefore his father told him to go away; that both of them started going away, and while he was going away, accused no.1 said to Jotiba that he would see Jotiba on the next day; that Jotiba said that he could see what he wanted on that day, and that both of them ran towards Jotiba; that scuffle came in his court yard and that his father was trying to separate the scuffle, as correct. He has only added that Sudhakar's father came to separate the scuffle with a sickle in his hand.

Accused no.1 has not denied the presence of Sudhakar. However, we feel that in the circumstances of the case even if this evidence is obliterated there is sufficient other evidence on record to establish the prosecution case.

23. P.W.12-Dattatraya Hanmant Magdum has stated that on the date of the incident he heard commotion from the side of Patane's house. He went there. He saw that Jotiba had received injury. He felt that it was necessary to take him to the dispensary for treatment. It was not possible to take him on the scooter. Therefore, he told the people to bring a rickshaw. The rickshaw was not immediately available. Therefore, he took his scooter and went to Gadhinglaj to inform the police. He told the police that there was an assault on Jotiba in his village and he should be brought to the dispensary. Then the police jeep with a Constable was sent to the village. In the meanwhile, the injured was brought to the dispensary at Gadhinglaj by rickshaw. He, therefore, went to the dispensary to see Jotiba. Jotiba was declared dead. In the cross-examination, this witness has stated that he could not tell the name of the

person who disclosed information about the fact that Jotiba was admitted. He has further stated that when he went to Shankar Patane's house, Shankar Patane and the females in his family were present and he did not ask them as to who had assaulted Jotiba. They also did not tell him about the assault on Jotiba. It is contended that it is inconceivable that this witness would not make the necessary inquiries, particularly because he is a lawyer. In his evidence, Magdum has stated that Jotiba was injured and it was necessary to take him to the dispensary. It is a fact that Jotiba was seriously injured. Therefore, it appears that his anxiety was to secure medical aid to Jotiba. Therefore, he seems to have rushed to the police station. In fact, he informed the police that Jotiba was attacked. P.W.8-Rajkumar N. Bagane has deposed that at about 10 p.m., Advocate Magdum came to the police station and he informed that there was a fight in village Belgundi, in which Jotiba was injured. Similarly, P.W.10-Bhimrao G. Ghorpade has confirmed that Magdum had been to the police station at about 10 p.m. on the same day and informed the police about the "Mara Mari" which had taken place in Belgundi. This witness has

made an entry to that effect in the station diary which is at Exhibit 30. We have perused that entry. It is a fact that advocate Magdum did report to the police station about the "Mara Mari". We are unable to read any motive in his conduct of not finding out the names of the assailants and not informing them to the police station because his evidence indicates that he wanted to urgently secure medical aid to Jotiba. It is true that as a responsible lawyer, he ought to have found out the names of the assailants. But that does not discredit him. It is significant to note that there are no major omissions in his evidence. Omission is only regarding his hearing commotion and his going to the police station on his scooter because rickshaw was not available. Nothing has been brought on record to suggest that he had any ill-feelings towards the accused or he wanted to falsely implicate the accused. It is true that P.W.2-Shankar Patane has said in his deposition that while he was going to the police station Advocate Magdum met him and told him to go to the police station as the police-men were his friends. That appears to be an assurance given to the neighbour who was going to the police station

after witnessing the serious incident which had taken place in his court-yard. There is nothing to indicate that he was in league with the police to concoct a false case. We find this witness to be a truthful witness.

24. That takes us to the evidence of P.W.1-Raosaheb S. Patil. He is the police patil of village Belgundi. He has stated that at about 9.30 p.m. on 22.3.1986, he was in his house. Accused no.1 and Ishwara Kurade came to his house. Accused no.1 told him that he was beaten by Vishnu and the deceased. By that time police van came there. Police constable Bagane asked him where the house of accused no.1 was situated as there was "Mara Mari" in the village. He told him that accused no.1 was in his house. Then he, accused no.1 and the police-men sat in the jeep and came before the house of P.W.2-Shankar Patane. Shankar Patane was there. They enquired about the whereabouts of Jotiba. Shankar Patane disclosed that accused No.1 had assaulted Jotiba with a sickle and that Jotiba was taken to the dispensary at Gadhinglaj. Then he went to Gadhinglaj police station by a police van. From there he went to see Jotiba at the hospital. He enquired with

Jotiba, but Jotiba was not in a position to speak. Thereafter, Jotiba died. Then he went to lodge his complaint, which is at Exhibit-18.

25. We find that there are no major omissions in the evidence of this witness. His evidence was attacked on the ground that if Shankar Patane had seen the incident, the complaint ought to have been lodged by him and not by the police patil. Shankar Patane has chosen to keep quiet. It was contended that the police patil has not lodged the FIR immediately. He first went to the hospital and, thereafter he went to the police station to lodge the complaint. This indicates that there is concoction. We are unable to agree with this. Shankar Patane has stated that after seeing the incident his son had a fit and he was busy attending to him. His not going to the police station immediately after the incident, therefore, cannot be misinterpreted. In a village the police patil enjoys a high position. Therefore the police had first visited his house. When an offence is committed, the police patil is supposed to send a Khabri report. It is, therefore, not unusual for the witnesses to inform the police patil and for the police patil to lodge the First

Information Report. It is significant to note that even accused no.1, after the assault, had gone to the house of this witness. Nothing has been brought on record to show that this witness had any enmity with the accused and that he was on good terms with the deceased and his family. He has categorically stated in his evidence that when he went to the police station, Shankar Patane was not in the police van. He has further stated that the police station officer informed him that Advocate Magdum has given him the information about the offence. It is true that he could have immediately lodged the complaint and rather than doing so, he chose to go to the hospital. But it appears that because Jotiba had received serious injuries, he went to see Jotiba first. After seeing Jotiba, he rushed to the police station and lodged his complaint. There is not much delay in lodging the FIR and in the facts of the case, we do not think that this delay has an adverse impact on the prosecution case. We find the evidence of this witness to be cogent and consistent. It inspires confidence. Having perused the evidence of the aforesaid witnesses, we are of the opinion that all the witnesses are consistent so far as the attack on the deceased by accused no.1 is

concerned.

26. We are, however, of the opinion that there is not enough evidence against accused no.2 to convict him. Our attention was drawn to **Rishideo Pande's case (supra)** where the Supreme Court has observed that it is not necessary to adduce direct evidence of the common intention. It may be inferred from surrounding circumstances and the conduct of the parties. But in the present case there is neither sufficient direct evidence of common intention nor can it be inferred from the surrounding circumstances and conduct of parties. There is omnibus reference to the participation of accused no.2. No specific role is assigned to him. We are, therefore, unable to confirm his conviction. Accused no.2 will have to be acquitted.

27. At this stage it will be necessary to have a look at the medical evidence. P.W.4 - Dr.Dattatraya A. Pavale was attached to Primary Health Centre at Gadhinglaj. On 22.3.1986 at 10.30 p.m. deceased Jotiba was admitted in the hospital. According to Dr.Pavale, Jotiba died within 10 minutes after admission. He was unable

to talk. Dr.Pavale did post-mortem of the deceased. The post-mortem notes are at Exhibit-22. On external examination, Dr.Pavale found the following injuries:

> "17. Surface wounds and injuries:-
>
> Their nature, position, dimensions (measured) and directions to be accurately stated their probable age and caused to be noted.
>
> If L+. supraclaricular area and anterior triangle of Neck Incised wound 3" x 1" breadth at centre oblique wound-spindle shaped. Fascia of neck seen-1" deep Blood dot seen at interior angle. L+ Jugular vein exposed. Blood my (+)(+)(+). "

Following are the internal injuries:-

"20. Thoram:- Haemothoram

(a) Walls, ribs, cartilages .. Ist rib on it.
Side cut.

(b) Pleura	..	Teared at site of injury at first rib.
(c) Larynm, Trachea and Bronchi.		
(d) Right Lung	..	Congested.
(e) Left Lung	..	At afex-stab injury 1/2" x 1" x 1" deep.
(f) Pericardium.	..	-
(g) Heart with weight large vessels	..	Empty both chambers L+ Subclavian artery & vein cut.
(i) Additional remarks	..	Blood accumulates in thoracic cavity."

The cause of death was given by Dr.Pavale as follows:-

" Death is due to haemorrhagic shock due to injury to (1) 1st rib fracture on it side.

(2) L+ Subclavian artery and vein cut.
(3) Afex of it Lung-stab injury.
(4) L+ sided haemopneumothorax. "

28. Post-mortem notes indicate that the attack was made with force. Injury was undoubtedly serious. First rib of the left side was cut. Pleura was torn at the side of injury at first rib. The right lung was congested. There was stab injury 1/2" x 1" x 1" deep on left lung at apex. Both chambers of the ear were empty. Left subclavian arteries and vein were cut. Subclavian arteries are at the base of the neck. An attack made on them is bound to result in forceful spurt of blood. Dr.Pavale has, therefore, described the cause of death as "due to haemorrhagic shock due to injury to (1) 1st rib fracture on its side, (2) L+ Subclavian artery and vein cut, (3) Afex of it Lung-stab injury & (4) L+ sided haemopneumothorax." It was pointed out by Mr.Nalavade that Dr.Pavale agreed to the

suggestion made by the defence that the incised wound can be homicidal, suicidal or accidental. This, in our opinion, does not help the defence. It is significant to note that Dr.Pavale has also stated that "ending portion" of the incised wound on Jotiba was deeper. Considering this and the consistent ocular evidence, we are of the opinion that the death could not have been accidental. It is an accepted principle reiterated by the Supreme Court time and again that consistent ocular testimony overrides the medical evidence. We have no manner of doubt, therefore, that the assault was intentional. It can never be described as accidental.

29. Medical certificates in respect of the examination of accused nos.1 and 2 the issued by Dr.Pavale are at Exhibits 34 and 35, respectively. Injury suffered by accused No.1 is described in certificate at Exhibit-34, is as under:-

"C/E : Clw on occipital bone
1/2" x 1/2" x scalp deep
Bleeding (+)

Impression Simple injury due to H & B object.

Age within 24 yrs. "

Injury suffered by accused No.2 is described in certificate at Exhibit-35, which is as under:-

" L/E - Indected wound on occipital bone
1/2" x 1" area orest formed
our H & B object.

Impression : Simple injury due to H & B object.
Age within 3 days. "

30. We find no hesitation in rejecting Mr.Nalavade's submissions based on the decisions of the Supreme Court in **Lakshmi Singh's case (supra)** and **D.V. Shanmugham's case (supra)** that non-explanation of injuries suffered by the accused is always fatal to the prosecution case. In **Lakshmi Singh's case**, the Supreme Court has observed that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of

the prosecution one. The Supreme Court has further observed that there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. Later judgments of the Supreme Court have consistently followed **Lakshmi Singh's case**. In the present case, the injuries suffered by the accused are certified by the doctor to be simple injuries. Besides, the evidence adduced by the prosecution is consistent and cogent and for the reasons which we will soon state the defence version can never compete in probability with the prosecution case. The prosecution witnesses cannot be called interested witnesses. Therefore, non-explanation of the injuries on the person of the accused, cannot affect the prosecution case adversely.

31. We will now examine whether the accused have probablised their defence. In his statement

recorded under Section 313 of the Code, accused no.1 has accepted that on 22.3.1986 at about 9 p.m. when Shankar Patane came near the house of Advocate Magdum, he saw a quarrel going on between him and the deceased. He has further accepted that he and the deceased were quarrelling in the court-yard of Sudharkar Patane's house and, therefore, Sudhakar's father told him to go away from the court-yard and that both of them started going away. He has further accepted that while he was going away he said to Jotiba that he would see Jotiba on the next day and that both of them ran towards Jotiba. He has further stated that P.W.2-Shankar Patane came to separate the scuffle with sickle in his hand. It is tried to be suggested to all the witnesses that the sickle held by Sudhakar Patane accidentally fell on the neck of deceased Jotiba and that caused a bleeding injury. We have already noted that this injury does not appear to be an accidental injury. We find this defence of the accused to be inherently improbable. If Shankar Patane wanted to separate the scuffle, he would never go to separate it with a sickle in his hand. We are more than certain that this is a totally false explanation given by the accused. Once we come to the conclusion that

prosecution has proved its case as against accused No.1, then this false defence would become an additional incriminating circumstance against accused no.1.

32. So far as false defence of the accused is concerned, Mr.Bagwe has relied upon a judgment of the Supreme Court in **Birbal's case** and **Manohar Kushaba Gangurde's case (supra)** where a Division Bench of this Court has followed the decision of the Supreme Court in **Birbal's case**. Mr.Nalavade has referred to the decision of the Supreme Court in **Sharad Sarda's case (supra)**. No doubt, all these decisions pertain to cases where there was only circumstantial evidence. In **Sharad Sarda's case** the Supreme Court has held that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. Where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. The Supreme Court has further observed that before using the additional link, it must be proved that all the links in the chain are complete and do not suffer from any infirmity. In **Birbal's case (supra)**, the Supreme

Court has held that giving a false explanation by the accused is an additional link in the chain of circumstances completing the chain. Though all these judgments pertain to cases which arise out of circumstantial evidence, we see no reason why the same principle cannot be applied to the present case. The above decisions persuade us to hold that once we come to a conclusion that the prosecution has proved its case beyond reasonable doubt against accused no.1, then his false defence would become an additional incriminating circumstance against him.

33. It was argued that there is a delay in lodging the FIR. It was pointed out that recovery of the sickle is disbelieved. In this connection, reliance placed on the **Gurnek Singh's case** by Mr.Bagwe is apt. While dealing with similar submissions, the Supreme Court has observed that if the other evidence is satisfactory and adequate, the fact that the court has considered that it is not safe to rely on the evidence regarding recovery does not detract from the merits of the evidence of the eye-witnesses which has been considered to be beyond reproach. As regards delay in lodging the FIR, the Supreme

Court has observed that in the facts of that case it was not unreasonable for the three witnesses to rush to the hospital on account of anxiety to save the life of Gurdarshan Singh instead of running to the police station. There is nothing unnatural in it. In this case also, Advocate Magdum had rushed to get medical aid to the deceased. Even Shankar Patane had first rushed to the hospital to make enquiry about the health of Jotiba. Thereafter, he rushed to the police station and lodged his complaint. We do not feel that this delay has affected the prosecution case adversely. As observed by the Supreme Court in **Ram Jag's case (supra)**, the witnesses cannot be called upon to explain every hour's delay and a commonsense view has to be taken in ascertaining whether the First Information Report was lodged after an undue delay so as to afford enough scope for manipulating evidence. The Supreme Court has further observed that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused.

We draw great support from these observations of the Supreme Court. We are not inclined to hold that the witnesses had any motive for implicating the accused. There is an acceptable explanation for delay. This submission of Mr.Nalavade must, therefore, fail.

34. In the ultimate analysis, we are of the opinion that the prosecution has made out its case against accused no.1. In our view, the rustic witnesses have unfolded the prosecution story truthfully. No doubt, there are minor discrepancies and embellishment in their evidence but they do not cut at the core of the prosecution case. The evidence of these witnesses, read as a whole, appears to have a ring of truth. If there are minor variations in their evidence, they are not against the general tenor of their evidence. In this connection, we may usefully refer to the observations of the Supreme Court in **Sardul Singh vs. State of Haryana (2002) 8 SCC 372**. The following are the material observations of the Supreme Court:-

> " There cannot be a prosecution case with a cast-iron perfection in all respects and

it is obligatory for the court to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seems to inspire confidence, too, in the mind of the court, the same cannot be discarded totally merely on account of certain variations or infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the

broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt. "

If the present case is viewed in the light of above observations of the Supreme Court, we feel that it must be held that the prosecution has been successful in bringing home guilt to accused no.1.

35. Now the question is what offence has accused no.1 committed. It was argued by Mr.Nalawade that if this court comes to a conclusion that he is guilty then only offence under Section 304 Part II is made out against him. Mr.Bagwe, on the other hand, drew our attention to clause thirdly of Section 300 which reads thus:

" **300. Murder**. - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

Secondly. - x x x

Thirdly. - If it is done with the

intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly. - x x x "

He submitted that since the blow was on the vital part of the body, intention of causing death must be attributed to accused no.1 and, therefore, his conviction under Section 302 of the I.P.C. should not be disturbed.

36. Both the learned Counsel have relied upon several judgments in support of their submissions. It is not necessary to refer to all the judgments because they reiterate the same principles. It is true that in **Virsa Singh's case (supra)** the Supreme Court has stated that even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. However, Section 304

Part II of the I.P.C. was not considered by the Supreme Court. Section 304 Part II reads thus:

> " 304. **Punishment for culpable homicide not amounting to murder.** - Whoever commits culpable homicide not amounting to murder shall be punished with .....
>
> or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. "

37. We are of the opinion that in the facts of this case it cannot be even said that accused no.1 had intention to cause bodily injury, sufficient to cause death in the ordinary course of nature. In this connection, we may refer to **Augustine Saldanha's case (supra)** there the Supreme Court was dealing with a case where the accused was held guilty of murder. The Supreme Court referred to **Virsa Sing's case (supra)**. In the facts of that case, the Supreme Court altered the conviction of

the accused from 300 to Section 304 Part II I.P.C. The Supreme Court held that the blow was said to have been delivered with a stick and in pitch dark night-time in the forest surroundings of the area where it occurred. The Supreme Court further observed that it could not be reasonably stated with any certainty that the accused chose that vital part of the body to inflict the injury and that the blow which was aimed without any of such specific intentions could have landed on the head due to so many other circumstances than due to any positive intention also.

38. We have examined the circumstances of the present case to ascertain likewise whether the intention could be attributed to accused no.1. Admittedly, a quarrel was going on between the accused and the deceased. There is evidence to indicate that the deceased had challenged the accused. It is also pertinent to note that accused no.1 did not go to assault the deceased with weapons. It is in fact the case of the prosecution that a sickle which was lying in the court-yard was picked up by accused no.1 and he assaulted the deceased with it. These facts, in our opinion, indicate that there was no intention

to cause death of Jotiba or to cause such bodily injury to him as was likely to cause his death. Admittedly, there was a scuffle between the accused and the deceased. It appears that suddenly in the heat of moment out of anger accused no.1 picked up the sickle which was lying in the court-yard and gave a blow on the deceased. It is true that the blow landed on the vital part of the body of the deceased but that by itself does not establish the intention to commit murder. If there was intention to murder it would have manifested itself in several circumstances. No such evidence is adduced by the prosecution. We, therefore, feel that accused no.1's conviction under Section 302 will have to be set aside and he will have to be convicted under Section 304 Part II of the I.P.C. Hence, the following order:-

O R D E R

(i). The conviction and sentence of appellant

no.2 (original accused no.2) Pandurang Bhima Kesarkar under the impugned judgment and order dated 17.10.1988 passed by the learned Additional Sessions Judge, Kolhapur, in Sessions Case No.62 of 1986 under Section 302 read with Section 34 of the I.P.C. is quashed and set aside. He is acquitted of the said charge. He is on bail. His bail bond stands cancelled.

(ii). The conviction and sentence of appellant no.1 (original accused no.1) Tukaram Bhima Kesarkar under Section 302 read with Section 34 of the I.P.C. under the impugned judgment and order, is quashed and set aside. Instead he is convicted under Section 304 Part II of the I.P.C. and sentenced to undergo RI for five years. He is also sentenced to pay a fine of Rs.10,000/-. In default of payment of fine, he shall undergo RI for one year. If fine is paid, out of the fine amount of Rs.10,000/-, Rs.7,000/- be paid as compensation to the heirs of deceased Jotiba Vishnu Powar.

(iii). Rest of the judgment and order of the learned Additional Sessions Judge in respect of the disposal of muddemal property, shall stand

confirmed.

(iv). The appeal is partly allowed and disposed of in the above terms

39. Mr.Nalavade, learned Counsel, prays that appellant no.1 (original accused no.1) be given time to surrender. In the circumstances of the case, appellant no.1 (original accused no.1) Tukaram Bhima Kesarkar is given eight weeks' time to surrender.

Smt.Ranjana Desai, J.

A.S. Oka, J.